North Dakota Law Review

Volume 78 | Number 1 Article 5

2002

Constitutional Law - Indian Law: The Ongoing Divestiture by the Supreme Court Of Tribal Jurisdiction over Nonmembers, on and off the Reservation

Kimberly Radermacher

CONSTITUTIONAL LAW—INDIAN LAW: THE ONGOING DIVESTITURE BY THE SUPREME COURT OF TRIBAL JURISDICTION OVER NONMEMBERS, ON AND OFF THE RESERVATION

Nevada v. Hicks, 533 U.S. 353 (2001)*

I. FACTS

Floyd Hicks (Hicks) was a member of the Fallon Paiute-Shoshone Tribes of Nevada (Tribe) and resided on the Tribes' reservation, which was established by the federal government in 1908.[1] In 1990, state game wardens suspected Hicks had killed, off the reservation and in violation of Nevada law, a California bighorn sheep, which is a protected species.[2] On August 30, 1990, Michael Spencer, a state game warden, sought a search warrant to investigate the allegations against Hicks.[3] A warrant was issued, subject to tribal court approval, because the state court held that the state did not have jurisdiction over the matter.[4] After obtaining approval from the tribal judge, Spencer and a tribal police officer searched Hicks's premises and took into possession one mounted bighorn sheep head.[5] The sheep head turned out to be from an unprotected species and was later returned to Hicks.[6]

One year later, a tribal police officer informed the game warden that two bighorn sheep heads were mounted in Hicks's home.[7] Spencer then sought another search warrant to search Hicks's home and again obtained approval from the tribal court.[8] Assisting in the second search were

---

* Winner of a North Dakota State Bar Foundation Outstanding Note/Comment Award.

1. Nevada v. Hicks (*Hicks III*), 533 U.S. 353, 355-56 (2001). The reservation consists of approximately 8000 acres and was established by federal statute, Act of 1908, ch. 53, 35 Stat. 85. *Id.*

2. *Id.* at 356. The offense is considered a gross misdemeanor under NEV. REV. STAT. § 501.376 (1995). *Id.*

3. *Id.*; *see also* Nevada v. Hicks (*Hicks II*), 196 F.3d 1020, 1022 (9th Cir. 1999).

4. *Hicks III*, 533 U.S. at 356.

5. *Id.*

6. *Hicks II*, 196 F.3d at 1022. The sheep head was that of a Rocky Mountain bighorn, which is a species not protected by statute. NEV. REV. STAT. § 501.376. Under the statute, a valid tag is required to kill or possess pronghorn antelope, certain bighorn sheep, black bears, elk, deer, mountain goats, and mountain lions. *Id.*

7. *Hicks III*, 533 U.S. at 356.

8. *Id.* The second warrant did not specify that tribal court approval had to be obtained; rather, the measure was taken as a safeguard. *Id.*

additional state game wardens, as well as tribal police officers.[9] During the second search, one or more sheep heads were taken into possession and again they were determined to be from an unprotected species.[10]

Hicks filed suit against several defendants in tribal court claiming that his sheep heads had been damaged and that the second search went beyond the scope of the warrant.[11] Specifically, Hicks's claims included abuse of process, unreasonable search and seizure, trespass to chattels and land, denial of equal protection, and denial of due process under 42 U.S.C. § 1983.[12] Hicks brought suit against the tribal judge, the state game wardens in both their official and individual capacities, the tribal officers, and the State of Nevada.[13] Hicks's claims against several of the defendants were dismissed, leaving the state game wardens in their individual capacities as defendants.[14]

The tribal court held, and the Tribal Court of Appeals affirmed, that the Tribe had jurisdiction to entertain Hicks's claims.[15] In return, the State and the game wardens sought declaratory judgment from the federal district court claiming that the tribal court lacked jurisdiction.[16] The district court granted Hicks summary judgment on the jurisdictional issue and held that all claims of qualified immunity[17] brought by the state officials would have to be exhausted in tribal court.[18] The Ninth Circuit affirmed the district court's holding, stating that the tribal court had jurisdiction over Hicks's claims because he resided on tribe-owned land within the boundaries of the Tribes' reservation.[19] The state game wardens and the State of Nevada

---

9. *Id.*

10. *Hicks II*, 196 F.3d at 1123.

11. *Hicks III*, 533 U.S. at 356.

12. *Id.* at 356-57. Under § 1983, a person acting under color of law can be held liable for infringing on another's constitutional rights. 42 U.S.C. § 1983 (1994). In addition, the statute provides injured individuals with a remedy for the deprivation of those rights. *Id.*

13. *Hicks III*, 533 U.S. at 356.

14. *Id.* Hicks's claims against the tribal judge and the tribal officers were dismissed by directed verdict. *Id.* Subsequently, Hicks dismissed his claims against the State of Nevada and the state game wardens in their official capacities. *Id.* at 357.

15. *Id.* at 357.

16. *Id.*

17. Public officials, in carrying out discretionary functions, can claim protection from civil liability, as long as their actions do not infringe upon an individual's statutory or constitutional rights. BLACK'S LAW DICTIONARY 753 (7th ed. 1999).

18. *Hicks III*, 533 U.S. at 356; *see also* Nevada v. Hicks (*Hicks I*), 944 F. Supp. 1455 (D. Nev. 1996).

19. *Hicks III*, 533 U.S. at 357; *see also* Nevada v. Hicks (*Hicks II*), 196 F.3d 1020, 1031 (9th Cir. 1999).

appealed to the United States Supreme Court, and the Court granted certiorari.[20]

The issues brought before the Court included whether a tribal court has jurisdiction to adjudicate claims brought against state officials for their alleged tortious conduct on tribe-owned land and whether it has jurisdiction to adjudicate § 1983 claims.[21] The Court *held* that tribal courts do not have jurisdiction to entertain claims regarding state officials' conduct in executing process because it is not crucial to tribal self-government or administration of internal control.[22] In addition, the Court concluded that because tribal courts are not courts of general jurisdiction they cannot adjudicate § 1983 claims.[23]

II. LEGAL BACKGROUND

A. TRIBAL JURISDICTION BEFORE THE COURT'S MONUMENTAL DECISION IN *MONTANA V. UNITED STATES* (1981)

Chief Justice John Marshall of the United States Supreme Court, in what has become known as the Marshall Trilogy,[24] set the backdrop for how courts and legislatures have dealt with Federal Indian law and the issue of tribal jurisdiction.[25] Out of these cases came the precedent that Indians did not have the right to own land, only the right to occupy it,[26] and that reservations were "domestic dependent nations," not foreign states.[27] However, in the last case of his trilogy, Chief Justice Marshall and the

---

20. *Hicks II*, 196 F.3d 1020, *cert. granted*, 531 U.S. 923 (2000).

21. *Hicks III*, 533 U.S. at 356. The Court also entertained the issue of whether the defendants were required to exhaust all of their claims in tribal court before taking them to federal court. *Id.* at 369. The Court held that "tribal exhaustion" was not necessary because the tribal court lacked jurisdiction, and it "would serve no purpose other than delay." *Id.*

22. *Id.* at 364.

23. *Id.* at 366.

24. The Marshall Trilogy consists of three cases, Worcester v. Georgia, 31 U.S. (1 Pet.) 515 (1832), Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 1 (1831), and Johnson v. McIntosh, 21 U.S. (1 Wheat) 543 (1823), which were decided by the United States Supreme Court while John Marshall was Chief Justice. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights*, 86 MINN. L. REV. 267, 269 & n.6 (2001).

25. *See generally Worcester*, 31 U.S. 515; *Cherokee Nation*, 30 U.S. 1; *Johnson*, 21 U.S. 543.

26. *Johnson*, 21 U.S. at 592.

27. *Cherokee Nation*, 30 U.S. at 17. The Court held that tribes constituted "domestic dependent nations . . . [in that] [t]heir relation to the United States resembles that of a ward to his guardian." *Id.*

Court held for the first time that state laws had no effect inside reservation borders.[28]

Over a century later, Justice Marshall's ideas were still causing a stir in cases such as *Williams v. Lee*.[29] In *Williams*, Lee, a non-Indian, owned a store within the Navajo Indian Reservation and attempted in the state court system to collect on a debt owed to him by a Navajo Indian and his wife.[30] Williams, the debtor, sought to dismiss the claims on the grounds that the state court lacked jurisdiction over the matter and that it should be tried in tribal court.[31] The United States Supreme Court held that when an Indian is a party to an action, the tribal court will have exclusive jurisdiction.[32] The Court stated that to allow otherwise, "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves."[33]

In 1976, the Supreme Court decided in *Fisher v. District Court of the Sixteenth Judicial District of Montana*[34] the issue of whether a state court had jurisdiction over an adoption proceeding involving only tribal members.[35] The Court held that regardless of whether the litigation involves a nonmember or only tribal members, the state's jurisdiction depends on whether the state action hinders tribes from creating and being governed by their own laws.[36] According to the Court, the state's involvement in an adoption proceeding concerning only tribal members would obviously interfere with the tribe's ability to govern itself and would subject tribal members to an inconvenient forum.[37] The Court concluded that "[s]ince the adoption proceeding is appropriately characterized as litigation arising

---

28. *Worcester*, 31 U.S. at 561. The Court held that the Cherokee Nation was a distinct entity and that nonmembers could not enter upon the reservation unless they had the consent of the tribe or were granted such right under treaty or statute. *Id.*

29. 358 U.S. 217 (1959).

30. *Williams*, 358 U.S. at 217-18.

31. *Id.* at 218.

32. *Id.* at 220. This was subject to whether Congress had enacted legislation stating otherwise. *Id.* At that time, Congress had rarely provided states with any authority to regulate Indians on reservations. *Id.* However, Congress had granted the federal courts jurisdiction over certain crimes committed by Indians against other Indians or persons, including murder, incest, manslaughter, robbery, arson, burglary, kidnapping, assault, and maiming. 18 U.S.C. § 1153 (2000).

33. *Williams*, 358 U.S. at 223.

34. 424 U.S. 382 (1976).

35. *Fisher*, 424 U.S. at 383. In *Fisher*, a mother lost custody of her son due to neglect. *Id.* The tribal court awarded custody to a third party, who later sought to adopt the child in state court. *Id.* The mother moved to dismiss the claim, stating that the tribal court had jurisdiction over the matter. *Id.* at 383-84.

36. *Id.* at 386.

37. *Id.* at 387-88. According to the bylaws and constitution of the Northern Cheyenne Tribe, the tribal court had exclusive jurisdiction over all adoptions involving tribal members. *Id.*

on the Indian reservation, the jurisdiction of the Tribal Court is exclusive."[38]

In *Oliphant v. Suquamish Indian Tribe*,[39] which was decided in 1978, the Court debated the validity of a law passed by the Suquamish Tribe that provided the tribal court with criminal jurisdiction over certain offenses committed by nonmembers, as well as members.[40] The issue of whether tribal courts could exercise criminal jurisdiction over nonmembers was one of first impression before the Court.[41] In making its decision, the Court looked to past congressional action, as well as case law of other jurisdictions, and found that "the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight."[42] The Court stated that by becoming incorporated within the United States, tribes relinquish the right to try non-Indians, except as provided for by Congress.[43] The Court held that tribes lack authority and jurisdiction to prosecute nonmembers in the absence of a congressional delegation providing otherwise.[44]

That same year, the Court held in *United States v. Wheeler*[45] that tribes still retain many aspects of sovereignty, not only over their members but also over tribal territory.[46] This includes the rights of tribes to create and

---

38. *Id.* at 389. The Court stated that the tribe's exclusive jurisdiction is not based on race, rather it is based on the "quasi-sovereign" nature of the tribe as provided for under federal law. *Id.* at 390.

39. 435 U.S. 191 (1978).

40. *Oliphant*, 435 U.S. at 194. This case involved two separate petitioners, both of whom were non-Indian residents of the reservation and were arrested for committing crimes on the reservation. *Id.* Oliphant was arrested for assaulting a tribal police officer, while Belgarde was arrested for reckless endangerment and damaging property. *Id.* At the time, the Suquamish Tribe was one of twelve tribes that passed a law extending tribal jurisdiction over nonmembers in the criminal context, and its court was one of thirty-three tribal courts that attempted to enforce such jurisdiction. *Id.* at 196.

41. *Id.* at 197.

42. *Id.* at 206.

43. *Id.* at 210. The idea that tribes are precluded from exercising certain powers because of their incorporation into the United States is not new to the Court. *See* Johnson v. McIntosh, 21 U.S. (1 Wheat) 543, 574 (1823). In 1823, the Court held that tribes are restrained from exercising authority that would conflict with interests of the United States because the tribes are no longer truly sovereign. *Id.* The Court has also held that since tribes are located within the boundaries of the United States, their interests are subordinate not only to the federal government, but to the states as well. *Oliphant*, 435 U.S. at 211; *see also* United States v. Kagama, 118 U.S. 375, 379 (1886).

44. *Oliphant*, 435 U.S. at 208.

45. 435 U.S. 313 (1978).

46. *Wheeler*, 435 U.S. at 323. Wheeler, a member of the Navajo Tribe, was arrested on the reservation and charged under the laws of the tribe with disorderly conduct and contributing to the delinquency of a minor. *Id.* at 314-15. Stemming from the same incident, Wheeler was later charged with the statutory rape of a female tribal member under federal law. *Id.* at 315-16.

enforce laws for their members, as well as to punish them for breaking those laws.[47] However, this does not include the power of tribes to prosecute nonmembers for crimes in tribal court, to transfer land that tribes occupy to nonmembers, or to enter into certain types of relationships with foreign entities.[48]

Wheeler raised the novel issue of whether a tribal member could be charged under both federal law and tribal law for offenses stemming from the same incident.[49] The Court held that when a tribe punishes one of its members for an offense, it is not as an "arm of the Federal Government," but as its own sovereign.[50] Because the tribe and the federal government are considered separate entities, a prosecution under the laws of one does not constitute the same offense under the laws of the other; therefore, double jeopardy is inapplicable as a defense.[51]

In *Washington v. Confederated Tribes of the Colville Indian Reservation*,[52] the Court considered whether a state could impose taxes on certain transactions which occur within a reservation.[53] In *Confederated Tribes*, the State of Washington sought to apply taxes to cigarette and other tobacco products being sold on the reservation.[54] The tribes were already collecting their own taxes on the cigarette sales, which the Court found constituted a significant interest to the tribes.[55] However, the Court held that the state also had an interest in taxation and the revenue it would provide.[56]

---

47. *Id.* at 322, 326. The Court held that even though tribes and their reservations fall within the territory of the United States and are afforded some protections by the United States, tribes still retain a certain level of sovereignty. *Id.* at 323.

48. *Id.* at 326. The Court held that "[t]hese limitations rest on the fact that the dependent status of Indian tribes . . . is . . . inconsistent with their freedom independently to determine their external relations." *Id.*

49. *Id.* at 314. The respondent claimed that this constituted double jeopardy under the Fifth Amendment. *Id.* Double jeopardy is when an individual is prosecuted more than once for the same or similar crime. BLACK'S LAW DICTIONARY 506 (7th ed. 1999).

50. *Wheeler*, 435 U.S. at 329.

51. *Id.* at 329-30. The Court found that tribal courts are usually limited in the amount of fines and the length of jail sentences they can impose; therefore, defendants will usually receive a mild punishment from tribal courts. *Id.* at 330; *see also* 25 U.S.C. § 1302 (2000). The federal government retains jurisdiction over several major crimes committed on reservations, including manslaughter, murder, incest, and arson. *Wheeler*, 435 U.S. at 330; *see also* 18 U.S.C. § 1153 (2000). Individuals found guilty of such crimes will receive a more severe punishment in federal courts than in tribal courts. *Wheeler*, 435 U.S. at 330.

52. 447 U.S. 134 (1980).

53. *Confederated Tribes*, 447 U.S. at 139.

54. *Id.* The State, in addition to imposing taxes, was confiscating untaxed cigarettes en route to the reservation. *Id.*

55. *Id.* at 152. The Court stated that it has been recognized that "tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." *Id.*

56. *Id.* at 157.

The Court stated, "[i]t can no longer be seriously argued that the Indian Commerce Clause[57]. . . bars all state taxation of matters significantly touching the political and economic interests of the Tribes."[58] Therefore, the Court concluded that a state tax on certain items within the reservation would not be burdensome and would not impede on the tribe's right to create laws and be governed by them.[59] The Court's holding in *Confederated Tribes* came less than a year before its paramount holding in *Montana v. United States*.[60]

B. THE *MONTANA* RULE AND ITS EXCEPTIONS: HOW IT HAS CHANGED TRIBAL JURISDICTION

Chief Justice Marshall stated in *Worcester v. Georgia*[61] that a state's laws have no effect inside reservation borders.[62] Over the next century, the Supreme Court moved away from this idea and began to chip away at tribal sovereignty by allowing more state regulation of tribal matters.[63] The Court also stripped the tribes of any sovereignty over relations with nonmembers.[64]

In *Montana v. United States*, the Crow Tribe sought to regulate hunting and fishing by nonmembers on land located within the reservation, but not owned by the tribe.[65] The Court decided that tribes can regulate fishing and

---

57. The Indian Commerce Clause is found in the United States Constitution and provides for the regulation of commerce by the federal government of Native American tribes. U.S. CONST. art. I, § 8, cl. 3. The clause, according to the Court in *Confederated Tribes*, is aimed at "preventing undue discrimination against, or burdens on, Indian Commerce." *Confederated Tribes*, 447 U.S. at 157.

58. *Confederated Tribes*, 447 U.S. at 157.

59. *Id.* at 156-57. The Court also held that it would not be burdensome for the State to require tribes to place tax stamps on their cigarettes before sale and to keep records of sales on taxable and nontaxable items. *Id.* at 159.

60. 450 U.S. 544 (1981).

61. 31 U.S. (1 Pet.) 515 (1832).

62. *Worcester*, 31 U.S. at 561.

63. *See Confederated Tribes*, 447 U.S. at 156-57.

64. Montana v. United States, 450 U.S. 544, 563-64 (1981) (citing United States v. Wheeler, 435 U.S. 313, 326 (1978)). The Court held that tribes retain sovereignty over tribal territory and tribal members; however, the dependent status of the tribes divests them of the authority to regulate matters outside of the reservation. *Wheeler*, 435 U.S. at 326.

65. *Montana*, 450 U.S. at 548-50. The Crow Tribal Council, believing that the Tribe had been granted control over the Big Horn River by treaty with the United States, passed laws to restrict hunting and fishing on the Reservation by nonmembers. *Id.* at 548-49. However, the State of Montana was also asserting jurisdiction over hunting and fishing by nonmembers. *Id.* This prompted questions at trial and on appeal whether the Big Horn River was owned by the tribe or by the State of Montana. *Id.* at 549-50. The Supreme Court held that it belonged to the state by virtue of title granted by the United States upon Montana becoming part of Union. *Id.* at 551. After title has been granted, the land is governed by state law unless Congress conveys the land

hunting by nonmembers on land owned by the tribe or held in trust for it, as well as stipulate nonmember entry onto the land.[66] However, tribes cannot regulate fishing and hunting by nonmembers on land held in fee simple[67] by nonmembers.[68] The Court stated that to determine whether there is tribal jurisdiction, the general rule is that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[69]

However, the Court did not completely dismiss the possibility that the tribes could exert jurisdiction over nonmembers under certain circumstances and, by doing so, carved out two exceptions to the general rule.[70] First, the Court held that when nonmembers enter into consensual relationships[71] with a tribe or its members, the tribe retains the right to regulate such activity.[72] Under the second exception, the Court found that tribes may regulate nonmember activity on tribe-owned land within the reservation if such activity would threaten the economic security, political integrity, or the health and well-being of the tribe and its members.[73]

After its decision in *Montana*, the Court took a different standpoint in *National Farmers Union Insurance v. Crow Tribe*[74] regarding the extent of tribal civil jurisdiction.[75] In *National Farmers*, the Court considered whether the Crow Tribal Court had jurisdiction to entertain a tort action which had originated on state-owned land within the reservation.[76] The Court held that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, [and] the extent to

---

"in order to perform international obligations." *Id.* (quoting Shively v. Bowlby, 152 U.S. 1, 48 (1894)).

66. *Id.* at 557.

67. Fee simple is an interest in property or land that remains with the holder of the interest until the holder dies without an heir to take the interest. BLACK'S LAW DICTIONARY 630-31 (7th ed. 1999). Fee simple is "the broadest property interest allowed by law." *Id.*

68. *Montana*, 450 U.S. at 566.

69. *Id.* at 564. The Court held that regulating hunting and fishing by nonmembers on land not owned by the tribe was not necessary to preserve self-government or control domestic affairs. *Id.* at 630.

70. *Id.* at 565.

71. Consensual relationships can include leases, contracts, or other dealings. *Id.*

72. *Id.* The Court held that such regulation may occur through "taxation, licensing, or other means." *Id.*

73. *Id.* at 566.

74. 471 U.S. 845 (1985).

75. *National Farmers*, 471 U.S. at 849.

76. *Id.* at 850-53. In *National Farmers*, a member of the Crow Tribe was hit by a motorcycle in the parking lot of the school he attended, which was located on state-owned land within the reservation. *Id.* at 847. A suit to recover damages was brought against the school district in tribal court. *Id.*

which that sovereignty has been altered, divested or diminished."[77] Statutes, as well as case law, administrative law, and treaties must be examined to determine whether a tribal court has been divested of its sovereignty to hear a particular case.[78] In addition, the Court found that when a tribal court's jurisdiction is brought into question, the tribal court has the right to first determine whether it has jurisdiction over the matter before a case can be removed to another court.[80]

In *Iowa Mutual Insurance v. LaPlante*,[81] the Court again looked at the rule regarding the right of a tribal court to determine its own jurisdiction, which is also known as tribal exhaustion.[82] The Court held that as a matter of comity,[83] federal courts should abstain from granting removal of cases involving tribal members until the tribal court has had an opportunity to decide whether it has jurisdiction.[84] In addition, the Court concluded that tribal courts should retain civil jurisdiction over nonmember activity that occurs on the reservation, unless the tribal court is divested of that right by federal statute or treaty.[85]

---

77. *Id.* at 855-56.

78. *Id.*

80. *Id.* at 856-57. The Court held that allowing the tribal court to determine its own jurisdiction would promote Congress' "policy of supporting tribal self-government and self-determination." *Id.* at 856. It would also aid in the development of a complete record prior to addressing the merits of the case, as well as a proper remedy, and it would allow the tribal court to cure any errors it had made. *Id.* at 856-57.

81. 480 U.S. 9 (1987).

82. *Iowa Mut. Ins.*, 480 U.S. at 15-16. In this case, an employee of the Wellman Ranch Company, which was located on the Blackfeet Indian Reservation, was injured in a car accident. *Id.* at 11. The employee filed a claim against two insurance companies in tribal court to recover damages for his injuries. *Id.* The insurance companies argued that the tribal court lacked jurisdiction and sought to have the case removed to federal court on the basis of diversity of citizenship. *Id.* at 12-13.

83. Comity is the courtesy a political entity gives to another entity when recognizing the other's laws, judicial decisions, etc. BLACK'S LAW DICTIONARY 261-62 (7th ed. 1999).

84. *Iowa Mut. Ins.*, 480 U.S. at 15-16. Tribal exhaustion requires the exhaustion of all possible remedies in tribal court before removing the case to another court. *Id.* It also provides a tribal court with the opportunity to determine its own jurisdiction over a claim and to address any challenges to its jurisdiction. *Id.* The Court created the tribal exhaustion rule to "encourag[e] tribal self-government" and to promote a tribe's authority over its own affairs. *Id.* In addition, the Court held that a tribal court is better suited to determine issues of tribal law, and this rule helps to preserve that end. *Id.* at 16.

85. *Id.* at 18.

In 1989, the Court decided *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[86] which dealt with the zoning of land owned in fee simple by nonmembers, but located within the Yakima Reservation.[87] The Court had to determine which entity, Yakima County or the Yakima Nation, had the authority to zone such lands.[88] The Court held that tribes do not have the authority to zone lands held in fee by nonmembers that are open to the general public, when there is no threat to the tribe's security, integrity, or health and well-being.[89] The Court stated that where a threat to the tribe does exist, that threat "must be demonstrably serious" and the tribe must have a "protectible interest in what is occurring on adjoining property" in order to justify the exercise of tribal jurisdiction over nonmembers in similar situations.[90]

A decade later, *Strate v. A-1 Contractors*[91] was decided.[92] In *Strate*, the Court sought to clarify its holdings in *National Farmers* and *Iowa Mutual* because tribes were misinterpreting the holdings as granting them authority over nonmembers.[93] The Court held that the rules set out in those cases did not overturn or expand upon its holding in *Montana*; rather, they did nothing more than set out a doctrine of tribal exhaustion as a matter of prudence and comity.[94] The Court reiterated that neither case granted tribal courts adjudicatory jurisdiction over nonmembers.[95]

---

86. 492 U.S. 408 (1989).

87. *Brendale*, 492 U.S. at 414. The Yakima Nation had passed zoning ordinances, which encompassed tribal land, as well as land that belonged to nonmembers. *Id.* at 416. The County of Yakima had also passed zoning ordinances that encompassed some of the same land, although lands held in trust for the tribe were excluded. *Id.* After two individuals, Brendale and Wilkinson, sought to alter their property and applied to the county for approval, the Yakima Nation brought suit contesting the alterations and the county's zoning authority. *Id.* at 418-19.

88. *Id.* at 414-15.

89. *Id.* at 430-31.

90. *Id.*

91. 520 U.S. 438 (1997).

92. *Strate*, 520 U.S. at 442.

93. *Id.* at 453; *see generally* Iowa Mut. Ins. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Ins. v. Crow Tribe, 471 U.S. 845 (1985). In *Strate*, the tribe and the United States focused on the Court's wording in *Iowa Mutual*, which stated that regarding nonmember activity on the reservation, "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Strate*, 520 U.S. at 451 (quoting *Iowa Mutual*, 480 U.S. at 18). The Court found that the tribe had misinterpreted the phrase, and when taken in context, the phrase did not limit the rule set out in *Montana*. *Id.* at 452-53.

94. *Strate*, 520 U.S. at 452-53.

95. *Id.* at 448.

In *Strate*, the Court also held that the tribal court did not have civil jurisdiction to adjudicate a claim that arose out of an accident that occurred on a state highway which ran through the reservation.[96] The Court adhered to its ruling in *Montana* that tribes generally lack civil jurisdiction over nonmembers on land not owned by the tribe, absent congressional delegation specifying otherwise.[97] In addition, the Court held that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed [a tribe's] legislative jurisdiction . . . [a]bsent congressional direction enlarging tribal-court jurisdiction."[98]

In *Atkinson Trading Co. v. Shirley*,[99] the Court again addressed whether a tribe has the power to tax nonmembers on nontribal land.[100] The Court held that the Navajo Nation could not tax nonmembers on land held in fee by nonmembers based on its holding in *Montana* and because Congress had not delegated such power to the tribe by treaty or statute.[101] The Court reiterated that "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' but their dependent status generally precludes extension of tribal civil authority beyond these limits."[102]

For over a century, the Court maintained a trend of minimizing tribal sovereignty, first by taking away tribal criminal jurisdiction over nonmembers, and then by taking away tribal civil jurisdiction over nonmember activity on land not owned by the tribe, but within the reservations.[103] By the time the Court had decided *Atkinson*, the tribes were virtually powerless

---

96. *Id.* at 442. An accident between two nonmembers occurred on a North Dakota highway located on trust land and running through the Fort Berthold Indian Reservation. *Id.* at 442-43. Gisela Fredericks, one of the individuals involved in the accident, was seriously injured and remained hospitalized for approximately twenty-four days. *Id.* She filed suit in tribal court against the driver of the other vehicle and against the driver's employer to recover damages. *Id.* at 443. Fredericks' five children, who were tribal members, also filed suit in tribal court against the same parties claiming loss of consortium. *Id.* at 443-44.

97. *Id.* at 446. This is subject to the two exceptions set out in *Montana*, which are the consensual relationship exception and the threat to the tribe's well-being, security, and integrity exception. *Id.*

98. *Id.* at 453.

99. 532 U.S. 645 (2001).

100. *Atkinson*, 532 U.S. at 647-49. Here, the Navajo Nation tried to place an eight percent tax on hotel rooms located within its borders. *Id.* at 647-48. The guests of the hotel would pay the tax, while the hotel owners would collect the tax and give it to the tribe. *Id.* at 648.

101. *Id.* at 654. The tribe tried arguing that its taxation fell under either of the *Montana* exceptions; however, the Court held that the tribe "failed to establish that the hotel occupancy tax [was] commensurately related to any consensual relationship with petitioner or [was] necessary to vindicate the Navajo Nation's political integrity." *Id.* at 658-59.

102. *Id.* at 659 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

103. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978); *see also* Montana v. United States, 450 U.S. 544, 564 (1981).

to regulate any matters that went beyond reservation borders and tribal members.[104]

III. ANALYSIS

Hicks III was decided by a nine-to-zero vote.[105] Justice Scalia wrote the opinion of the Court, which was joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Ginsburg.[106] The Court held that the Fallone Paiute-Shoshone Tribal Court did not have jurisdiction over the state game wardens' actions, nor did it have jurisdiction over § 1983 claims.[107] Justice Souter wrote a concurring opinion, which Justices Kennedy and Thomas joined.[108] Justice Souter agreed that the tribal court did not have jurisdiction to adjudicate Hicks's claims; however, he stated that he would have adhered strictly to the *Montana* rule, rather than focusing on state interests as the Court did.[109] Justice Ginsburg also wrote a concurring opinion.[110] In her concurrence, Justice Ginsburg stated that the Court's holding applied only to tribal jurisdiction over state officials, but it left open the question of whether a tribe could exercise jurisdiction over nonmembers in general.[111]

Justice O'Connor wrote a concurrence in part and in judgment, which was joined by Justices Stevens and Breyer.[112] In her concurrence, Justice O'Connor concluded that the rule set forth in *Montana* does not necessarily prohibit tribal jurisdiction over nonmembers on tribal land just because those nonmembers happen to be state officials.[113] Justice O'Connor concurred in the judgment, but she stated that she would have reversed on the state officials' immunity claims.[114] Justice Stevens filed his own opinion concurring in judgment, which was also joined by Justice Breyer.[115] Justice Stevens stated that, absent congressional action providing otherwise, the question of whether tribal courts are courts of general

---

104. *Atkinson*, 532 U.S. at 658-59.

105. Nevada v. Hicks (*Hicks III*), 533 U.S. 353, 354 (2001).

106. *Id.* at 355.

107. *Id.* at 364-68.

108. *Id.* at 375 (Souter, J., concurring).

109. *Id.* at 375-76.

110. *Id.* at 386 (Ginsburg, J., concurring).

111. *Id.*

112. *Id.* at 387 (O'Connor, J., concurring).

113. *Id.* at 401. According to the Court's opinion, Justice O'Connor's concurrence appeared to be more of a dissent because not only did she disagree with the opinion in regard to the scope of tribal jurisdiction, she also disagreed about whether a tribal court has authority to adjudicate § 1983 claims. *Id.* at 370-74.

114. *Id.* at 401.

115. *Id.* at 401-02 (Stevens, J., concurring).

jurisdiction should be a matter left to the tribal courts.[116] He argued therefore that tribal courts should not be denied the right to adjudicate § 1983 claims.[117]

A. THE OPINION OF THE COURT

The Court focused on two primary issues: (1) whether the tribal court had jurisdiction over the state game wardens' alleged tortious conduct on tribe-owned land, and (2) whether it had jurisdiction to entertain 42 U.S.C. § 1983 claims.[118]

1. The Tribal Court Did Not Have Jurisdiction over the State Game Wardens' Alleged Tortious Conduct on Tribe-Owned Land

When examining whether the Tribe could adjudicate a matter involving a nonmember, the Court first had to consider whether the Tribe could regulate the matte.[119] The Court referred to *Montana* when trying to decide the extent of the tribe's regulatory authority.[120] In *Montana*, the Court held that when nonmembers are involved, the tribe cannot exercise its power "beyond what is necessary to protect tribal self-government or to control internal relations . . . without express congressional delegation."[121] An exception to this rule is when nonmembers consensually enter into relationships, such as contracts, with the tribe or tribal members.[122] Although the game wardens consensually obtained a tribal warrant, the Court held that the "consensual relationship" exception was not applicable because obtaining a warrant did not constitute an "other arrangement," as articulated

---

116. *Id.* at 402-04.

117. *Id.*

118. *Id.* at 357. The issue of tribal exhaustion was raised on appeal; however, because the Court found that the tribal court did not have jurisdiction over the matter, addressing tribal exhaustion was unnecessary and "would serve no purpose other than delay." *Id.* at 369.

119. *Id.* The Court had to inquire whether the Tribe "either as an exercise of their inherent sovereignty, or under grant of federal authority–[could] regulate state wardens executing a search warrant for evidence of an off-reservation crime." *Id.* at 358. If the Tribe had authority to regulate the state game wardens' actions, the tribal court would have jurisdiction over disputes arising from those actions. *Id.* at 358 n.2.

120. *Id.* at 358.

121. *Id.* at 359. *Montana* is viewed as one of the primary cases on the matter of tribal jurisdiction over nonmembers. *Id.* at 349; *see generally* Montana v. United States, 450 U.S. 544 (1981). In *Montana*, the Court held that the Crow Tribe could not regulate the activities of nonmembers on land not tribally-owned. *Montana*, 450 U.S. at 566-67.

122. Nevada v. Hicks (*Hicks III*), 533 U.S. 353, 359 n.3 (2001).

in *Montana*.[123] The Court went on to state that when taken in context, "other arrangement" refers to a "private consensual relationship," which was not apparent here.[124]

The Court looked at ownership status of the land where the state game wardens' conduct took place when deciding whether tribal regulation over their conduct was "necessary to protect tribal self-government or to control internal relations."[125] The Court held that ownership status of land is not conclusive in regard to the issue of jurisdiction, rather it is only a factor to be considered when deciding whether a tribe can regulate nonmember conduct.[126] The Court went on to state that tribal ownership of land by itself cannot confer upon a tribe regulatory authority over nonmembers.[127]

The Court examined prior case law to determine what actually constitutes those things that are "necessary to protect tribal self-government or to control internal relations."[128] It found, in *Montana v. United States*, that appropriate exercises of tribal authority include the power to regulate rules of inheritance, tribal membership, punishment of members for offenses, and domestic relations.[129] Because tribes have "the right . . . to make their own laws and be ruled by them," tribal regulation of nonmembers must be connected to that right.[130] However, this right does not preclude the state from ever exercising its authority on tribe-owned land.[131]

According to the Court, the sovereignty of tribes has virtually evaporated, giving way to more state regulation within the reservations' borders.[132] The greater the state's interest in a matter that has occurred on

---

123. *Id.* The Court in *Montana* determined that when tribes enter into consensual relationships, such as leases, contracts, commercial transactions, or "other arrangements" with nonmembers, the tribe may regulate such activities. *Montana*, 450 U.S. at 565.

124. *Hicks III*, 533 U.S. at 359 n.3.

125. *Id.* at 359-60.

126. *Id.* The Court did not elaborate on what other factors need to be taken into consideration when deciding whether a tribal court has jurisdiction over a nonmember. *Id.*

127. *Id.* The Court has seldom upheld tribal jurisdiction over nonmembers on land not owned by the tribe. *Id.* The exception is *Brendale v. Confederated Tribes*, 492 U.S. 408, 443-44 (1989), where the Court allowed the tribe to regulate zoning on land that was not tribally owned and closed to the general public. *Id.* at 360.

128. *Id.*

129. *Id.* at 361.

130. *Id.* (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)). Where Congress is silent, courts must look at the state's infringement on the right of the tribe to make its own laws, when there is a conflict among state and tribal court jurisdiction over a matter involving both tribal members and nonmembers. *Id.*

131. *Id.*

132. *Id.* In *Worcester v. Georgia*, 31 U.S. (1 Pet.) 515 (1832), Chief Justice Marshall stated that the laws of the state have no force within reservation boundaries. *Worcester*, 31 U.S. at 561; *see also* Nevada v. Hicks (*Hicks III*), 533 U.S. 353, 361 (2001). However, this view has given way to the idea that reservations are now considered part of the state and no longer sovereign entities. *Hicks III*, 533 U.S. at 361-62.

reservation land, the greater degree of regulatory authority the state can exercise, even over tribal members.[133] However, when only tribal members are involved in a matter that has occurred on tribal land, the state has little or no interest and will usually not get involved.[134] The Court concluded that Nevada had a significant interest in its officials' execution of process related to the violation of Nevada Revised Statute section 501.376 and that "even when it relates to Indian-fee lands, it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government."[135] Absent congressional action revoking the state's inherent jurisdiction, no federal statute exists that prevents state officials from entering a reservation for the purposes of investigating or prosecuting state offenses.[136]

Even though the Court found that tribal courts generally do not have jurisdiction over nonmembers, particularly state officials executing process on tribe-owned land, the Court still addressed the issue of whether a tribal court has the authority to adjudicate § 1983 claims.[137]

2. *The Tribal Court Is Not a Court of General Jusrisdiction and Therefore It Cannot Entertain 42 U.S.C. § 1983 Claims*

When determining whether a court has jurisdiction to entertain claims brought under § 1983, it must first be determined whether the court is a court of general jurisdiction.[138] State courts are courts of general jurisdiction, which allows them to hear cases involving federal statutes and claims, including § 1983 claims.[139] The Court found that tribal courts are not courts of general jurisdiction because when it comes to nonmembers, a tribal court's adjudicative jurisdiction is only as great as its legislative jurisdiction.[140] Congress has provided tribal courts with some authority to decide certain matters of federal law, but not § 1983 claims.[141]

---

133. *Hicks III*, 533 U.S. at 362.

134. *Id.*

135. *Id.* at 364-65; *see also* NEV. REV. STAT. § 501.376 (1995).

136. *Hicks III*, 533 U.S. at 365.

137. *Id.* at 366.

138. *Id.* A court of general jurisdiction is a court that can "hear a wide range of cases, civil or criminal, that arise within its geographic area." BLACK'S LAW DICTIONARY 856 (7th ed. 1999).

139. *Hicks III*, 533 U.S. at 366. The Court has implied that under Article III of the United States Constitution state courts can adjudicate matters involving federal law, and are granted concurrent jurisdiction over such matters. *Id.* at 366-67.

140. *Id.* at 367.

141. *Id.* at 367-68. Some aspects of federal law can be adjudicated by tribal courts, which include foreclosures on mortgages against tribal members by the Secretary of Housing and Urban

The Court also reasoned that tribal courts lack jurisdiction over § 1983 claims because the federal-question removal statute, 28 U.S.C. § 1441, does not provide for removal from tribal court to a federal forum.[142] Under § 1441, a case brought into state court may be removed to federal court, if the federal court has original jurisdiction.[143] The Court claimed that removal would cause "serious anomalies" because defendants would be unable to seek a federal forum if they were hailed into tribal court.[144] The Court concluded that because tribal courts are not courts of general jurisdiction and § 1441 does not provide for removal from tribal courts to federal courts, tribal courts cannot adjudicate § 1983 claims.[145]

B. JUSTICE SOUTER'S CONCURRENCE

Justice Souter, along with Justices Kennedy and Thomas, agreed that the tribal court did not have jurisdiction to adjudicate Hicks's claims.[146] However, Justice Souter found that by strictly adhering to the *Montana* rule, the Court could have reached the same conclusion without having to focus primarily on the state's interests in carrying out process.[147] Justice Souter found that, aside from its exceptions, the *Montana* rule bars tribal jurisdiction over all nonmembers, not only state officials, regardless of whether the incident occurred on tribe-owned land.[148]

To look at the ownership status of the land on which the incident occurred as a primary factor in deciding tribal jurisdiction "would produce an unstable jurisdictional crazy quilt."[149] Justice Souter agreed with the Court that ownership status of the land on which the incident occurred is a

---

Development and disputes over child custody under the Indian Child Welfare Act of 1978. *Id.; see also* 12 U.S.C. § 1715z (2000); 25 U.S.C. § 1911 (2000).

142. *Hicks III*, 533 U.S. at 368; *see also* 28 U.S.C. § 1441 (1994). The Court held that it would be easier to find that tribal courts did not have jurisdiction to adjudicate § 1983 claims than to deal with the removal issue and the problems associated with it. *Hicks III*, 533 U.S. at 369.

143. 28 U.S.C. § 1441 (1994). Under § 1441, a federal court will have original jurisdiction if the action arises under the laws and Constitution of the United States, regardless of the citizenship of the parties. *Id.* Removal is more difficult when the action does not arise under the laws or Constitution of the United States, because citizenship or ownership of property in the jurisdiction becomes a prerequisite for removal. *Id.* Original jurisdiction is a court's authority to hear an issue before another court has had the opportunity to review it. BLACK'S LAW DICTIONARY 856 (7th ed. 1999).

144. *Hicks III*, 533 U.S. at 368. In its brief, the government stated that the lack of reference to tribal courts in § 1441 was not a problem, claiming that Congress would not try to deny tribal defendants the same rights as state defendants. *Id.*

145. *Id.* at 368-69.

146. *Id.* at 375 (Souter, J., concurring).

147. *Id.*

148. *Id.* at 375-76.

149. *Id.* at 383.

factor to be considered when deciding whether a tribal court would have jurisdiction over a nonmember.[150] However, Justice Souter stated that this factor is only relevant in the application of the *Montana* exceptions and should not be a controlling factor, because it would only lead to confusion due to the ever changing characteristics of tribes and tribal jurisdiction.[151]

C. JUSTICE GINSBURG'S CONCURRENCE

In her brief concurrence, Justice Ginsburg clarified that the Court's holding applied only to tribal jurisdiction over state officials and left open the question of tribal jurisdiction over nonmembers, including state officials not acting within the scope of employment, on tribe-owned land.[152] Justice Ginsburg pointed out that the jurisdictional questions posed and left unanswered in *Strate v. A-1 Contractors* were not answered by the Court's limited holding.[153]

D. JUSTICE O'CONNOR'S CONCURRENCE IN PART AND IN JUDGMENT

Justice O'Connor criticized the Court's holding, stating that it "undermine[d] the authority of tribes to 'make their own laws and be ruled by them.'"[154] Justice O'Connor argued that the Court did not follow prior precedent when it held that the tribal court did not have jurisdiction over the state game wardens.[155] According to Justice O'Connor, the Court, in applying the rule set out in *Montana*, decided for the first time that tribal jurisdiction over nonmembers is lacking, regardless of whether the incident in question occurred on tribe-owned land.[156] Justice O'Connor reasoned that the Court's opinion and its application of *Montana* were flawed because it gave little emphasis to the fact that the incident occurred on tribe-owned land and focused too much on the fact that the nonmembers were state officials.[157]

---

150. *Id.*

151. *Id.*

152. *Id.* at 386 (Ginsburg, J., concurring).

153. *Id.* In *Strate*, the Court had questioned whether tribes would have jurisdiction over nonmembers on tribe-owned land but did not actually answer the question. Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

154. Nevada v. Hicks (*Hicks III*), 533 U.S. 353, 387 (2001) (O'Connor, J., concurring).

155. *Id.* at 385.

156. *Id.* at 387.

157. *Id.* at 391.

Justice O'Connor argued that the Court gave little reasoning as to why the exceptions to the *Montana* rule, namely the "consensual relationship" exception, did not apply.[158] The Court found that the "consensual relationship" exception applies only to private relationships, which would be inapplicable in this case.[159] Justice O'Connor found that whether a consensual relationship did exist was questionable; however, the Court should not have concluded that one could never exist in similar circumstances.[160] Justice O'Connor asserted that there is no reason "to create a per se rule that [would] foreclose future debate as to whether cooperative agreements, or other forms of official consent, could ever be a basis for tribal jurisdiction."[161]

Next, Justice O'Connor examined the Court's treatment of *Montana's* second exception, which allows for tribal regulation of nonmember conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[162] Justice O'Connor argued that the Court gave little basis for why the execution of process by a state officer is not fundamental to a tribe's right to self-governance.[163] Justice O'Connor found that tribes retain a great deal of interest in what occurs on their land and was disturbed by the Court's undermining of that interest.[164] Justice O'Connor was even more troubled by the Court's disregard of the fact that the state wardens' actions took place on tribe-owned land, and she concluded that a tribe's interest is paramount under these circumstances and should not be disregarded just because the nonmembers in this case happened to be state officials.[165]

---

158. *Id.* The Court briefly addressed the "consensual relationship" exception in footnote three of its opinion, which Justice O'Connor found to be inadequate. *Id.*

159. *Id.* The Court stated that the *Montana* Court, by creating the exception for "consensual relationships," did not intend to include the state or state officials and offered prior precedent, which dealt only with private individuals, as support for its conclusion. *Id.* at 372.

160. *Id.* at 393. The Court, in rebutting Justice O'Connor's concurrence, stated that it did not find that the "consensual relationship" exception would never be applicable; rather, the language in *Montana* does not appear to include under this exception state officers obtaining a warrant from a tribal court. *Id.* at 372.

161. *Id.* at 393.

162. *Id.*

163. *Id.* The Court claimed that Justice O'Connor gave very little reasoning and evidentiary support for why she found that state service of process implicated a tribe's right to self-governance. *Id.* at 370.

164. *Id.*

165. *Id.* The Court considered the ownership status of the land where the incident occurred, but it found the state's interest outweighed the fact that tribe-owned land was involved. *Id.* The Court concluded that this might not always be the situation. *Id.*

Justice O'Connor stated that the case should have been decided based on the state game wardens' claims of immunity.[166] According to Justice O'Connor, any claims of immunity should be addressed by a court as soon as possible to avoid any unnecessary litigation.[167] Because the court of appeals failed to do this, Justice O'Connor argued that the case should have been reversed and remanded to determine if there was tribal jurisdiction under the *Montana* rule.[168]

E. JUSTICE STEVENS' CONCURRENCE IN JUDGMENT

In his concurrence, Justice Stevens disagreed with the Court that tribal courts could not entertain § 1983 claims.[169] Instead, he concluded that tribal courts should be able to do so unless enjoined by a federal court.[170] Justice Stevens argued that when there is no federal law stating otherwise, "the question whether tribal courts are courts of general jurisdiction is fundamentally one of *tribal* law."[171] When a tribal court has jurisdiction over the parties, it should not be denied the ability to adjudicate their § 1983 claims.[172] Justice Stevens did not find it troublesome that § 1983 is silent regarding tribal courts and their ability to adjudicate such claims, primarily because it is also silent in regards to state courts which are allowed to adjudicate § 1983 claims.[174]

IV. IMPACT

The United States is home to approximately 560 federally recognized tribes and 262 tribal courts.[175] As a result of United States Supreme Court decisions regarding tribal jurisdiction in the last thirty years, tribal courts

---

166. *Id.* at 398. "The doctrines of official immunity and qualified immunity are designed to protect state and federal officials from civil liability for conduct that was within the scope of their duties or conduct that did not violate clearly established law." *Id.* (citations omitted).

167. *Id.* at 400.

168. *Id.* at 399-400. The Court criticized Justice O'Connor's concurrence by stating that she "manages to have [her] cake and eat it too—to hand over state law-enforcement officers to the jurisdiction of tribal courts and yet still assure that the officers' traditional immunity . . . will be protected." *Id.* at 373.

169. *Id.* at 400 (Stevens, J., concurring).

170. *Id.* at 402.

171. *Id.* (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (finding that the question of state subject matter jurisdiction is guided by state law)).

172. *Id.* at 403.

174. *Id.* at 403-04.

175. John Gibeaut, *Native Americans and the Law: Courting Trouble*, 86 A.B.A. J. 68, 68 (Mar. 2000).

have lost most of their sovereignty as well as financial support.[176] By limiting the amount of money allocated to tribal courts, the federal government appears to be following the same trend of divestiture taken by the Court.[177] This has left many tribal courts struggling with heavy caseloads and little money.[178]

Tribes have expressed concern that the Court's recent decisions will lead to "judicial termination," as well as make tribal governments powerless to defend the cultural identities of tribal communities.[179] As a result, several tribal leaders and their representatives gathered in Washington, D.C., to discuss possible legislation that would help restore tribal sovereignty and jurisdiction.[180] Some propose that an amendment be made to 18 U.S.C. § 1151, which would allow for tribal jurisdiction over incidents that occur on and off the reservation.[181] Other proposed legislation includes the restoration of tribal criminal jurisdiction over nonmembers, the recognition by Congress of the authority of tribes to regulate and tax, and federal funding for a Federal Indian appeals court.[182]

In addition to proposing legislation, the group of leaders that met in Washington, D.C., sought to establish the "Tribal Sovereignty Protection Initiative," which has six main objectives.[183] These objectives include the

---

176. *Id.* at 68-69. Tribal courts receive very little federal funding in contrast to state and federal courts. *Id.* at 69. Congress tried to cure this discrepancy by passing the Tribal Justice Act of 1993; however, the Act has never been enforced and no money has been appropriated under it. *Id.*

177. *Id.* Tribal courts receive approximately $11 million a year from the Bureau of Indian Affairs and have recently received additional federal funds of $5 million from the Judicial Department. *Id.*

178. *Id.* In 1998, the courts of the Navajo Nation heard over 27,600 criminal cases. *Id.* With the increase in crime on reservations, tribes have had to increase spending to hire additional police officers and build jails, which have taken away funding for tribal courts. *Id.* In the last two years, $172 million has been spent to improve tribal criminal justice systems across the nation. *Id.*

179. *See generally As NCAI Annual Session Enters Final Day, Officers are Elected and Business Goes On,* Alliance of California Tribes, *available at* http://pechanga.net/ (last visited Mar. 15, 2002); *Issues*, Cabazon Tribe, *available at* http://www.cabazonindians.com/issues.html (last visited Mar. 15, 2002).

180. Brian Stockes, *Tribal Leaders Discuss Jurisdiction as Pentagon Attacked*, INDIAN COUNTRY TODAY, Sept. 14, 2001, at A1.

181. Brenda Norrell, *American Indian Leaders Plan Defense Strategies: Supreme Court Attacks Sovereignty*, INDIAN COUNTRY TODAY, Oct. 2, 2001, *available at* http://www.indiancountry.com/?1787 (last visited Mar. 15, 2002). Tribal leaders hope to push this and other legislation through by 2002-2003. *Id.*; *see also* 18 U.S.C. § 1151 (2000).

182. Carolyn Calvin, *Navajo Council Approves Policy Position "On Court's Diminishment of Sovereignty,"* NAIIP NEWS PATH, Aug. 31, 2001, *available at* http://www.the PeoplesPath.com.net/News2001/0108/Navajo010831Policy.htm (last visited Mar. 15, 2002). In addition to proposing legislation, tribal leaders are calling for tribes to unite and defend their "inherent sovereign rights." *Id.*

183. *Tribal Leaders Forum: A Strategic Plan to Stop the Supreme Court's Erosion of Tribal Sovereignty, available at* http://www.ncai.org/main/pages/issues/governance/documents/Sept11Summary.pdf (last visited Mar. 15, 2002).

development of legislation to reestablish tribal jurisdiction, the formation of a project that will "support and coordinate tribal advocacy before the Supreme Court," and the promotion of ideas that will assist tribal governments in protecting tribal jurisdiction.[184] Also included are the increase of "tribal participation in the selection of federal judiciary," the development of media and other means of making the public and Congress aware of tribal governance and the promotion of the Initiative, and the implementation of fundraising for various organizations, as well as the Initiative.[185] The overall goal of the Initiative is to pass a "comprehensive bill to protect [t]ribal sovereignty."[186]

North Dakota has four Native American tribal courts, which are located in Fort Yates, Fort Totten, Belcourt, and New Town.[187] Because these courts are governed by *Hicks III*, as well as other holdings regarding tribal jurisdiction, they will share in and experience repercussions similar to other tribal courts throughout the nation.[188]

According to David Getches, an Indian law scholar, "[u]nless and until Indian law is again understood by the Court to be a distinct field, with its own doctrines and traditions rooted in the nation's history and Constitution, it is likely that Indian policy will unravel further."[189] As a result, the interests of Indians will suffer and there will be mass confusion as to the law that will govern conflicts and controversies arising between tribes and non-Indian parties.[190]

V. CONCLUSION

In *Hicks III*, the Court held for the first time that tribal courts do not have jurisdiction over a state official's conduct on tribe-owned land and that state authority does not stop at a reservation's borders.[191] The Court

---

184. *Id.*

185. *Id.* These organizations include the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). *Id.*

186. *Id.*

187. *See* B.J. Jones, *A Primer on Tribal Court Civil Practice*, THE GAVEL, Aug.-Sept. 1998, 12, 14 n.1, *available at* http://www.court.state.nd.us/Court/Resource/Tribal.htm. The Standing Rock Sioux Tribal Court and its appellate court can be found in Fort Yates. *Id.* The Spirit Lake Tribal Court is located in Fort Totten, while the Turtle Mountain Band of Chippewa Tribal Court and its independent appellate court are located in Belcourt. *Id.* The Fort Berthold District Court of the Three Affiliated Tribes is located in New Town. *Id.*

188. *See* Tony Mauro, *O'Connor, Breyer Go West, Get an Earful on Indian Rulings*, NAT'L L.J., Aug. 6, 2001, at A10.

189. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 361 (2001).

190. *Id.*

191. Nevada v. Hicks (*Hicks III*), 533 U.S. 353, 361-66 (2001).

noted that the ownership status of land is only one factor to consider in determining whether a tribal court will have jurisdiction over a non-member.[192] In addition, the Court held that tribal courts are not courts of general jurisdiction, and therefore, they cannot entertain § 1983 claims.[193]

Kimberly Radermacher[*]

192. *Id.* at 360.

193. *Id.* at 367-69.

[*] I would like to thank my family, friends, and significant other, Lon, and his family for supporting me and encouraging me throughout my educational endeavors.